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No. 93-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

THE WHITE MOUNTAIN APACHE TRIBE OF ARIZONA,
Petitioner,

v.

THE UNITED STATES,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the United States Court of Appeals for the Federal Ciruit has violated Petitioner White Mountain Apache Tribe's Constitutional right to judicial due process by affirming the orders of the Court of Federal Claims which denied Petitioner Tribe its repeated efforts to be heard respecting its valid claims to title to 16,090 acres of land situated within Tribe's Fort Apache Indian Reservation which are presently illegally occupied by the United States Trustee which is now and has been utilizing those 16,090 acres of land for its own use and benefit?

Whether the United States Court of Appeals for the Federal Circuit has violated Petitioner White Mountain Apache Tribe's Constitutional right to due process by affirming the decision of the Court of Federal Claims which—having found that the United States was liable for accelerated erosion which had its inception in 1912, if not before, and is ongoing today destroying Tribe's reservation—nevertheless, refused to award damages (1) for the accelerated erosion antecedent to August 13, 1946, the terminal date for claims pursuant to the Indian Claims Commission Act, and (2) for the accelerated erosion which continues to date?

LIST OF THE PARTIES

A list of all parties to the proceedings in the Court whose judgment is sought to be reviewed [substituted parties]:

Petitioner White Mountain Apache Tribe of Arizona, Fort Apache Indian Reservation and The United States of America, Trustee for Petitioner White Mountain Apache Tribe.

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For The Federal Circuit

Petitioner White Mountain Apache Tribe respectfully prays the Court that a writ of certiorari issue to review the unpublished Opinion of the United States Court of Appeals for the Federal Circuit which was rendered on August 17, 1993, a timely petition for rehearing having been denied by the Court of Appeals on September 13, 1993.

OPINIONS BELOW

The United States Court of Federal Claims entered its Opinion on February 6, 1987, and selected pages from that Opinion are Appendix 4 of this Petition.[1] Petitioner White

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[1] Appendix 4, *White Mountain Apache Tribe of Arizona v. The United States*, Defendant, No. 22-H, 11 Ct.Fed.Cl. 614 (1987) selected pages pertaining to issues presented here.

Mountain Apache Tribe appealed the February 6, 1987 Opinion of the Court of Federal Claims to the United States Court of Appeals for the Federal Circuit. That Court of Appeals rendered its Opinion on August 17, 1993, which Opinion is Appendix 1 of this Petition.[2] The Court of Appeals on September 13, 1993, entered its Order denying Petitioner's request for rehearing. That Order of Denial is Appendix 1A of this Petition.[3]

JURISDICTION

The Opinion of the United States Court of Appeals for the Federal Circuit was rendered August 17, 1993 and the Petition for Rehearing was denied September 13, 1993. The 90-day period for filing a petition for a writ of certiorari would have expired December 13, 1993. Petitioner Tribe's motion for an extension of time in which to file this petition for a writ of certiorari was granted on December 1, 1993, extending the time for that filing to and including January 11, 1994. The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Article I, Section 8, Clause 3.

> The Congress shall have power . . . to regulate Commerce . . . with the Indian Tribes; . . .

Constitution of the United States, Amendment [V], Right of Persons.

> No person shall . . . be deprived of life, liberty or property, without due process of law; nor shall

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[2] Appendix 1, Unpublished Opinion of the United States Court of Appeals for the Federal Circuit, Appeal No. 93-5018.

[3] Appendix 1A, Order by U.S. Court of Appeals for the Federal Circuit denying Petitioner's request for rehearing.

private property be taken for public use, without just compensation.

STATUTORY PROVISIONS INVOLVED

25 U.S.C. 70(a), The Indian Claims Commission Act.

> The Commission shall hear and determine the following claims against the United States on behalf of any Indian Tribe . . . ; (1) claims in law or equity arising under the Constitution, laws, treaties of the United States, and Executive orders of the President; (2) all other claims in law or equity, including those sounding in tort, with respect to which the claimant would have been entitled to sue in a court of the United States if the United States were subject to suit, . . . (5) claims based upon fair and honorable dealings that are not recognized by any existing rule of law or equity. No claim accruing after August 13, 1946, shall be considered by the Commission.

28 U.S.C. 1254(1)

> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods (1) By writ of certiorari granting upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . . .

STATEMENT OF THE CASE

Petitioner White Mountain Apache Tribe, Whiteriver, Arizona, is a duly organized Indian Tribe recognized by the Secretary of the Interior. Petitioner Tribe invoked the

jurisdiction of the then Indian Claims Commission[4] seeking to recover damages that it had experienced due to the mismanagement of Petitioner Tribe's Fort Apache Indian Reservation by the United States Trustee.

Having been repeatedly denied its Constitutional right to judicial due process, the right to a full and fair hearing before courts of competent jurisdiction respecting the damages Tribe has sustained including the refusal of the courts below to enforce the Compromise Settlement of 1972, due to the illegal seizure and use of Petitioner's invaluable land by the United States Trustee, and the ongoing destruction of Tribe's Fort Apache Reservation due to the Trustee's mismanagement, concerning which Petitioner Tribe has been denied judicial relief. Petitioner White Mountain Apache Tribe prays the Court to grant Tribe's petition for a writ of certiorari thereby assuring that the Tribe's Constitutional rights to due process shall be preserved respecting:

(1) The Opinion of the United States Court of Appeals for the Federal Circuit[5] affirming the decisions and orders by the Court of Federal Claims[6] denying Petitioner Tribe's

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[4] Suit was authorized by the Indian Claims Commission Act of August 13, 1946, Pub.L. No. 79-726, § 2, 60 Stat. 1049, 1050 as amended, 25 U.S.C. § 70a (1976) (omitted from Code pursuant to Commission terminated on September 30, 1978); thereafter jurisdiction continued in the then United States Claims Court, now the United States Court of Federal Claims (See Appendix 4, p. 16a for full jurisdictional statement).

[5] Appendix 1, p. 1a-3a, The unpublished opinion of the United States Court of Appeals for the Federal Circuit, dated August 17, 1993, in the case of *White Mountain Apache Tribe v. United States;* Appendix 1A, p. 4a, Order dated September 13, 1993 of the Court of Appeals for the Federal Circuit denying Tribe's Petition for a Rehearing Respecting August 17, 1993 Opinion.

[6] Appendix 2, p. 5a-6a, Order of the United States Court of Federal Claims, filed December 15, 1987, denying the Tribe the right to be heard respecting Tribe's claim to title to 16,090 acres of land within Tribe's Fort Apache Indian Reservation but permitting the Tribe to

Constitutional right to judicial due process in seeking to have enforced the Compromise Settlement of 1972 which adjudged and decreed Tribe's valid claims to title to 16,090 acres[7] of Petitioner Tribe's invaluable forests and grazing lands within Tribe's reservation illegally seized by the Trustee.

(2) The Opinion of the United States Court of Appeals for the Federal Circuit[8] affirming the refusal of the Court of Federal Claims[9] to award damages to Petitioner Tribe for the ongoing destruction of Petitioner Tribe's Fort Apache Indian Reservation by reason of accelerated erosion and the consequences thereof concerning which that court explicitly found that the United States Trustee was liable.[10]

I. SUMMARY OF RELEVANT FACTS

The Subject Res—The Fort Apache Indian Reservation

The trust relationship which exists between Petitioner Tribe and the United States of America was effectively established when President Grant proclaimed the November 9, 1871 Executive Order[11] which carved from Tribe's ancient ancestral domain the White Mountain Apache Indian Reservation. Altruism was not a factor in the assumption by the United States of America of the status of a Trustee for Petitioner Tribe. To the contrary, the United States was the prime beneficiary of the early ending of the protracted and costly war with the Western

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file and make part of the record the Affidavit of Expert Elmer M. Clark respecting Tribe's title to that land.

[7] Appendix 3, Affidavit of Expert Elmer M. Clark, dated March 3, 1987 establishing Tribe's claim to title to the 16,090 acres, p. 9a.

[8] Appendix 1, p. 1a-3a.

[9] Appendix 2, p. 5a-6a.

[10] Appendix 4, 11 Cl.Ct. 614, 659 (1987), p 46a.

[11] Appendix 5, Executive Order, November 9, 1871, p. 67a.

Apaches[12] which was achieved by the 1871 Executive Order providing Petitioner Tribe with a permanent home and abiding place which is now being destroyed by accelerated erosion for which the Court of Federal Claims found the Trustee liable and the Federal Circuit affirmed.

A critical factor in the establishment of Petitioner Tribe's White Mountain Apache Indian Reservation was the designation of the watershed divide between the Salt and Little Colorado Rivers—a conspicuous and well known natural monument—as the northern boundary of Tribe's reservation.[13] That natural monument was referred to in the November 9, 1871 Executive Order as "the south edge of the Black Mesa"[14] and was likewise referred to in the December 14, 1872 Executive Order which enlarged Tribe's reservation.[15] Thereafter, Congress, by the Act of June 7, 1897[16] severed Petitioner Tribe's reservation from that of the San Carlos Reservation designating it as the Fort Apache Indian Reservation, without any change being made in the northern boundary of Tribe's reservation.

The Fort Apache Indian Reservation, in the year 1897, can best be described as a treasure of immense value. As found by the Court of Federal Claims:

> The Fort Apache Indian Reservation contains 1,664,289 acres of land potentionally suitable for the grazing of livestock—virtually the entire reservation.[17]

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[12] Appendix 6, Selected pages, 21 Ind.Cl.Comm. 189 (1969), Finding 10, American Period, p. 72a.

[13] Appendix 3, p. 9a; Compromise Settlement, Appendix 10, p. 87a to 94a.

[14] Appendix 5, Executive Order, November 9, 1871, p. 67a.

[15] Appendix 7, Executive Order of December 14, 1972, p. 77a.

[16] Appendix 8, Act of Congress dated June 7, 1897 (30 Stat. 62); (1 Kappler 86), p. 79a.

[17] Appendix 4, p. 21a.

As found by the Court of Federal Claims, the reservation was described as having "... excellent grass for grazing purposes ...."[18] It was likewise found by the Court of Federal Claims that Petitioner Tribe's reservation "... is forested over 1,061,000 of its acres, more than 685,000 acres of which are commercial forest."[19] This petition is on the background of a virtual destruction of Tribe's reservation, the subject *res*—a reservation of incalculable value retained by Petitioner Tribe as a home and abiding place—which Petitioner Tribe asserts has been systematically and intentionally mismanaged by the United States Trustee. For example, the Trustee has illegally seized 16,090 acres of Tribe's invaluable land, a substantial portion of which was comprised of ponderosa pine forests which the trial court found does not produce "... merchantable quality for lumber until it reaches the age of 130-150 years. At younger ages its only harvestable value is as pulpwood."[20] Yet the Trustee virtually clearcut that ponderosa pine forest and retained the proceeds for its own benefit. Respecting the balance of Tribe's reservation, the Court of Federal Claims found that the Trustee was liable for the accelerated erosion which Petitioner Tribe proved is ongoing today with the attendant severe and ever-expanding damages to which Petitioner Tribe has been subjected, all as will be subequently reviewed and documented.[21]

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[18] *Ibid.*

[19] *Ibid.*, p. 62a.

[20] *Ibid.*

[21] *Infra.*, p. 14, *et seq.*

II. NORTHERN BOUNDARY OF PETITIONER TRIBE'S RESERVATION AS DESIGNATED BY EXECUTIVE ORDERS OF 1871 AND 1872

A. The Trustee's Erroneous Survey of Tribe's Northern Boundary

The United States Trustee in 1887, having established the northern boundary of Tribe's reservation as the watershed divide between the Salt and Little Colorado Rivers, directed United States Deputy Surveyor Wallace, an agent of the trustee, to survey that boundary. The instructions to Wallace were specific: Wallace was to establish the northeast corner of Tribe's reservation[22] and from that initial point of survey, Wallace was directed to ". . . run in a Westerly direction following the Southern edge of the Black Mesa, as near as practicable,"[23] to a point due north of Sombrero or Plumoso Butte, at which point Wallace was required to establish the northwest corner of the reservation.

The record establishes that Wallace, without reason or justification, departed from the southern edge of the Black Mesa—the watershed divide—with the result that he excluded from Tribe's reservation 3500 acres in the first 100 miles of his survey.[24] Substantial portions of those 3500 acres excluded from Tribe's reservation were invaluable ponderosa pine forests which, due to those errors, were located within the Trustee's Sitgreaves National Forest or the Apache National Forest. At milepost 98 Wallace, in clear violation of his explicit instructions, again left the watershed divide for a distance of 22 miles departing a maximum of 3 miles from that divide. By that violation of his instructions, Wallace excluded from Tribe's reservation 12,590 acres of invaluable ponderosa pine forests

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[22] Appendix 3, Affidavit of Elmer M. CLark, p. 9a-10a.

[23] *Ibid.*, p. 10a.

[24] *Ibid.*, p. 9a.

in a single tract of land,[25] thus adding that acreage to what is now referred to as the Trustee's Sitgreaves National Forest. There is graphically displayed in Plate I below, the disastrous consequences of the erroneous departure by the Wallace survey from the south edge of the Black Mesa for the last twenty miles of the designated natural monument which comprises the northern boundary of Tribe's reservation.

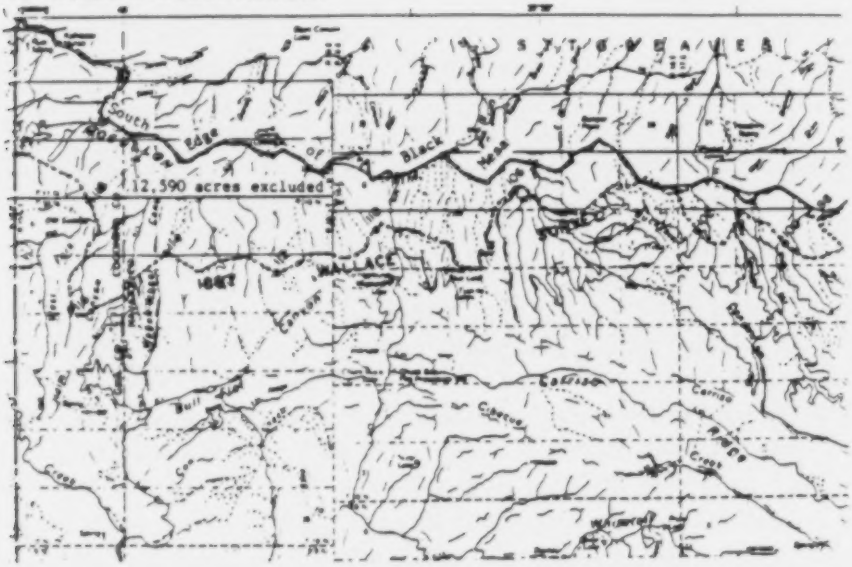

PLATE I

Plate I establishes the single most important fact in this phase of Petitioner Tribe's statement which is: The Northern Boundary of Tribe's reservation is the watershed divide between the Salt and Little Colorado Rivers Drainages. As a result, all of the tributaries of the Salt River are south of that divide, a fact graphically displayed in the upper right hand segment of the Plate set forth in

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[25] *Ibid.*, Plate I is limited to 12,590 acres of lands excluded from the Reservation by the Trustee's erroneous survey. Space did not permit graphically to display the several separate departures by Wallace from the watershed divide up to mile post No. 98 which resulted in the exclusion of 3500 acres of Tribe's reservation.

the Opinion of the Court of Federal Claims.[26] As shown there, the principal tributaries of the Salt River within the Tribe's reservation—Canyon Creek, Cibecue Creek, Carrizo Creek, and the Whiteriver—all rise within Tribe's Reservation south of the south edge of the Black Mesa, the watershed divide. It will be observed on Plate I above that the erroneous Wallace survey line severs the drainages of Canyon Creek, Cibecue Creek, and Carrizo Creek. By that mislocation of the northern boundary of Tribe's reservation, the erroneous Wallace line misrepresents the upper areas of those drainages as being part of the Little Colorado River Drainage—a physical impossibility. As a consequence, the reliance by the United States Trustee upon the Wallace survey line as the predicate for the illegal seizure of Tribe's 16,090 acres is wholly irrational and must be rejected.

B. Trustee's Title Opinion and Compromise Settlement

In an Opinion dated June 12, 1967 from the Solicitor's Office of the Department of the Interior[27] sustaining the 1887 Wallace survey, it is concluded that the error made in that survey, which is up to three (3) miles in width and 22 miles in length, excluding from Tribe's reservation 12,590 acres of ponderosa pine forests, was *not* a gross error. The Trustee's June 12, 1967 Opinion fails to take cognizance of the fact that the "south edge of the Black Mesa" was designated the northern boundary of Tribe's reservation—all as provided for in the Executive Orders of 1871 and 1872 creating Tribe's reservation. That designated northern boundary is the watershed divide between the Salt and Little Colorado Rivers, a well known and well defined natural monument. The Trustee in the June 12, 1967 Opinion seeks to justify the Wallace de-

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[26] Appendix 4, p. 19a.

[27] Appendix 9, p. 80a, Opinion of the Solicitor's Office, Department of the Interior, dated June 12, 1967.

parture from the watershed divide by a series of unsupportable conclusions. The most serious of those conclusions is the failure to recognize that the erroneous survey could not change the northern boundary of Tribe's reservation designated by the 1871 and 1872 Executive Orders which is the natural monument—the watershed divide between the Salt and Little Colorado Rivers.[28] Confirmatory of Petitioner Tribe's claim to title to the 16,090 acres of land within Tribe's reservation is this June 27, 1969 Finding by the Indian Claims Commission:

> . . . the United States took from the Western Apache Indians [The Petitioner] their Indian title to all of their aboriginal lands located *outside of the boundaries of the reservation established by the Executive Orders of November 9, 1871 and December 14, 1872.*[29]

Thereafter, the Indian Claims Commission approved the Compromise Settlement of September 12, 1972, declaring the lands "outside" of Tribe's reservation were taken by the United States Trustee which, in effect, declares that the lands within the reservation, including the 16,090 acres, were not taken but rather title to those lands remained in Petitioner Tribe, as is contended here by the Tribe.

Irrespective of the explicit language in the Executive Orders establishing the northern boundary of Tribe's reservation as the watershed divide between the Salt and Little Colorado River Drainages and the Compromise Settlement confirming that boundary, the United States Trustee has adamantly relied upon the erroneous Wallace survey for its illegal occupancy of 16,090 acres of Petitioner lands within Tribe's Fort Apache Indian Reservation.

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[28] *See Infra.*, p. 20, *et seq.*

[29] Appendix 6, p. 75a, 21 Ind.Cl.Comm. 189 (1969), Finding 12. (Emphasis supplied).

C. Denial by Court of Federal Claims of Tribe's Right To Be Heard Affirmed by Federal Circuit

There was succinctly reviewed by the United States Court of Appeals for the Federal Circuit in its May 10, 1988 Order Petitioner Tribe's efforts in its June 19, 1987 motion to be heard in the Court of Federal Claims respecting the illegal occupancy by the United States Trustee of the 16,090 acres.[30] It was recognized, moreover, in the May 10, 1988 Order of the Federal Circuit that Petitioner Tribe had asserted that the lands in question were improperly excluded from the Tribe's reservation by reason of the erroneous Wallace survey reviewed above.[31] Having referred to the December 15, 1987 Order of the Court of Federal Claims denying Tribe's request to be heard respecting the 16,090 acres, the Federal Circuit declared that the December 15, 1987 Order of the Court of Federal Claims lacked finality and hence could not be appealed, adding nevertheless:

> The issue that the Tribe seeks to present on appeal will be fully reviewable in the course of any final appeal in Docket 22-H.

Petitioner Tribe, relying upon the Federal Circuit's May 10, 1988 Order, repeatedly attempted to be heard by the Court of Federal Claims. That court repeatedly denied those motions. The Federal Circuit—having originally declared that Tribe's claims "on appeal will be reviewable"—departed from that initial ruling and affirmed the denial of Tribe's right to be heard respecting its claim to title to 16,090 acres leaving the Tribe without remedy or recourse giving rise to this petition.[32]

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[30] Appendix 11, p. 95-97a.

[31] Supra., p. 8, *et seq.*

[32] Appendix 11, p. 97a; Appendix 13, p. 101a-103a; Appendix 14, p. 104a-105a.

D. Denial of Tribe's Constitutional Right to Judicial Due Process of Law

Having been repeatedly denied its right to have enforced the Compromise Settlement of 1972 and its right to be heard respecting the damages Petitioner Tribe had sustained due to the illegal occupancy by the United States Trustee of Tribe's 16,090 acres, the Tribe appealed the final decisions in Docket 22-H.[33] In that appeal, the Tribe again referred to the fact that the Court of Federal Claims had repeatedly denied Tribe's efforts to be heard respecting its title to the 16,090 acres of land illegally occupied by the Trustee. It again prayed for an Order from the Federal Circuit requiring the Court of Federal Claims to decide the issue of whether the Compromise Settlement of 1972 affirmed Tribe's claims to title to the 16,090 acres and the damages the Tribe has sustained due to the illegal occupancy of those lands by the United States Trustee.

In its August 17, 1993 Opinion, in response to Tribe's appeal, the Federal Circuit recognized that the Court of Federal Claims did not "specifically" refer to Petitioner Tribe's claims respecting the 16,090 acres. Moreover, the only issue respecting that land was Tribe's renewed request for a hearing by the court below as to its claims to title to the 16,090 acres. There was not an issue before that court relative to the merits of Tribe's claim to title. Irrespective of that fact the Federal Circuit declared that the ". . . government persuasively explained that it [Tribe's claim] was resolved and subsumed in other proceedings." The Federal Circuit then delcared: "We . . . do not consider . . . further" Petitioner Tribe's request for an order requiring the Court of Federal Claims to grant the Tribe's

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[33] Appendix 4, p. 15a; *White Mountain Apache Tribe v. United States*, 11 Cl.Ct. 614 (1987); and Appendix 15, p. 106a-108a, *White Mountain Apache Tribe v. United States*, 26 Claims Court, 466 (1992).

request for a full and fair hearing, giving rise to this petition.[34]

III. ACCELERATED EROSION AND ITS ONGOING DISASTROUS CONSEQUENCES

A. Trustee Held Liable for Accelerated Erosion

The Court of Federal Claims found as a fact that:

> Since the Government initiated and condoned the stocking conditions that produced overgrazed rangeland, in breach of its fiduciary duty, it must be held liable for the accelerated erosion that resulted.[35]

Respecting that accelerated erosion for which the Trustee was declared liable, the Court of Federal Claims referred to the fact that "Plaintiff presented both historic and contemporary photographs depicting eroded land forms on the ranges." It is relevant that the Court of Federal Claims refers to the fact that it viewed ". . . for itself many eroded areas during its onsite inspection of the reservation,"[36] graphically displayed by Petitioner Tribe's photography. Seven of the reprints of those photos which are representative of the photos to which the Court of Federal Claims referred have been lodged by Petitioner Tribe with the Clerk of the Court. The Court is strongly urged to view those photographs and the environmental catastrophe for which the United States Trustee was held liable.

B. Accelerated Erosion—The Human Tragedy

The stark and tragic photos of the ongoing accelerated erosion on Tribe's reservation, which the Court of Federal Claims described in some detail, failed to include the hu-

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[34] Appendix 1, p. 2a.

[35] Appendix 4, p. 46a.

[36] *Ibid.*, p. 34a.

man tragedy which occurred and is ongoing.[37] Tracts of irrigated land along the numerous tributaries of the Salt River were maintained as a substantial source of food supply for the Tribe antecedent to the advent of the whiteman. By reason of that long history of irrigation, the Tribe was referred to as the "Agricultural Apaches." Those irrigated tracts received their supplies of Salt River water by means of irrigation ditches diverting directly from the tributary stream channels. The Court of Federal Claims found that the accelerated erosion by ". . . gouging the streambeds to levels below many of the existing irrigation channels,"[38] deprived the Apaches of their systems of irrigation with the attendant loss of a substantial share of their food supply. That court likewise found that the "end result" of the accelerated erosion was:

> . . . a loss of top soil from the range and the destruction of farmland as benches along streams are washed away or irrigation facilities are left stranded by ever-deepening streams.[39]

Further in regard to the consequences of the accelerated erosion, the Court of Federal Claims quoted extensively from a Report prepared in 1927 by the Bureau of Indian Affairs summarizing the destruction of Tribe's agricultural lands. These excerpts were taken by the court from that Report:

> . . . the storm waters come down off the mountains in such torrents that it destroys the agricultural land along the streambeds . . . . such terrible erosion that it has washed away at least 50% of the lands formerly cultivated by the Apache Indians . . . .[40]

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[37] Supra, p. 5, "The Subject Res."

[38] Appendix 4, p. 35a.

[39] *Ibid.*, p. 35a-36a.

[40] *Ibid.*, p. 34a.

Thereafter, the Report emphasizes that "[e]ach of the remaining 50 percent has been left so high and dry . . . that water cannot be put on it . . . ." The trial court added this statement from that Report:

> The agricultural products of the Indians have been reduced far over 50 percent through this cause since I have been here. It is a loss that no one can well appreciate until he sees it.[41]

C. Accelerated Erosion—Continuing Destruction of Tribe's Reservation

The accelerated erosion for which the Court of Federal Claims found the United States Trustee liable was and is a long term phenomenon which is continuing today. On the subject, Petitioner Tribe's Expert Geologist, Soil Scientist Mr. Kaczmarek, having comprehensively testified respecting the destruction by accelerated erosion of the Tribe's agricultural lands, expressed his conclusions as to the ongoing, irreparable damage being experienced today by the Tribe due to that accelerated erosion:

> . . . soil erosion on the range land surfaces is continuing at present at a rate at least equal to historic accelerated erosion and probably even more rapidly due to the continuing degradation of the vegetal cover of the reservation.[42] [See photos lodged with the Court]

Mr. Kaczmarek further describes in these graphic terms the consequences from the accelerated erosion throughout Tribe's reservation:

> . . . the damages to the reservation resources are continuing at a rate equal or in excess of the historic rates of resources degradation following

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[41] *Ibid.*

[42] Appendix 12, p. 100a, selected pages from Report of Investigations of the Processes of Accelerated Erosion.

> the initial surge of accelerated erosion occurring between 1912 and 1925.[43]

The Court of Federal Claims found that the United States Trustee agreed with the Tribe's assertions that the accelerated erosion is continuing to date, finding as a fact that "... the Government does not dispute that erosion has, *and is,* occurring on the reservation ...."[44]

Throughout the Court of Federal Claim's decision there is general acceptance that the damages experienced from accelerated erosion is and has been a continuing destructive force, adding that Tribe's expert, Mr. Kaczmarek, had constructed

> ... a credible explanation of how continued overgrazing could have reduced the vegetative cover of the range, [a] leaving bare spots on the soil surface, [b] increasing the aridity of the soil and [c] decreasing rainwater penetration of the soil.[45]

The continuing disastrous consequences stemming from the accelerated erosion were summarized by the Tribe's expert Kaczmarek when he reported to the Court of Federal Claims:

> Field investigations show that accelerated erosion *has proceeded* to the extend that the productivity of the land is diminished including approximately 427,811 acres of lands where the effects of the accelerated erosion have caused irreparable damage.[46]

Mr. Kaczmarek's declaration that the "... continuing degradation of the vegetal cover of the reservation"[47] is

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[43] *Ibid.*

[44] Appendix 4, p. 34a, (Emphasis supplied).

[45] *Ibid.*, p. 35a.

[46] Appendix 12, p. 99a.

[47] *Ibid.*, p. 100a.

fully corroborated by the Court of Federal Claims' finding that ". . . overgrazing changed the vegetative cover and topography of the rangeland to such an extent that top soil washed away, permanently eroding the landscape . . . ." Finally, Mr. Kaczmarek declared that the

> . . . accelerated erosion has continued on the Fort Apache Indian Reservation from at least as early as 1912 to the present and is continuing to damage reservation land, water, and range resources at an unabated rate . . . .[48]

Mr. Kaczmarek testified as to the ongoing accelerated erosion and expressed his opinion as to the costs of restoration which are wholly independent from the minimal damages calculated by the Court of Federal Claims for the reduction of the carrying capacity of the rangelands. He declared that the only means of preserving and protecting Tribe's reservation from further damages is a comprehensive program of restoration totalling as of that date $176,282,800.[49] The Federal Circuit affirmed the opinion of the court below which denied the Tribe any damages for the accelerated erosion irrespective of holding the Trustee liable for it.

ARGUMENT

REASON FOR GRANTING PETITION FOR WRIT OF CERTIORARI

I. Denial of Judicial Due Process Respecting Illegal Use and Occupancy of Petitioner Tribe's Lands by United States Trustee

Throughout these proceedings, Petitioner Tribe has proved that the Executive Orders of 1871 and 1872 designated the northern boundary of Tribe's reservation as

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[48] Appendix 12, p. 99a.

[49] Appendix 16, p. 113a.

the "south edge of the Black Mesa," which is the watershed divide, a natural monument separating the Salt and Little Colorado River Drainages. At issue here is whether an erroneous survey of that boundary by the Trustee—excluding from Tribe's reservation 16,090 acres—can deprive Petition Tribe of title to that land, as declared by the Trustee's Opinion of June 12, 1967, all as reviewed above.[50]

In the Trustee's Opinion dated June 12, 1967,[51] it is concluded that the error made in that survey, which is up to three (3) miles in width and 22 miles in length, excluding from Tribe's reservation 12,590 acres of ponderosa pine forests, was "no 'gross error' "[52] and sustained the erroneous 1887 Wallace survey, thus justifying the illegal occupancy of those lands by the United States Trustee. The Trustee's Opinion further seeks to justify the erroneous Wallace survey by a series of unsupportable conclusions. It fails to recognize as, a matter of law, that the erroneous survey could not change the northern boundary of Tribe's reservation which is a designated natural monument. In the instructions to Wallace that he was "to follow the southern edge of the Black Mesa as near as practicable," the Trustee expresses this wholly untenable conclusion:

> This does not, however, indicate that the surveyor contravened his instructions to follow the south edge of the mesa as closely as practicable. The south edge of the Black Mesa would certainly not coincide with the crown of the mesa.[53]

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[50] *Supra.*, p. 10.

[51] Appendix 9, Opinion of the Solicitor's Office, Department of the Interior, dated June 12, 1967, p. 80a.

[52] *Ibid.*, p. 86a.

[53] Appendix 3, p. 10a.

That single statement mandates the complete rejection of the Trustee's Opinion evidencing a total lack of comprehension of both the facts and the controlling law. Rudimentary knowledge establishes without question that the south edge of the Black Mesa "is the crown of the mesa." Continuing irresponsibly, the Trustee's Opinion states that the south edge of the Black Mesa ". . . would necessarily be a line to the south of the highest elevation on the mesa,"[54] which, as repeatedly emphasized, is "the highest elevation on the mesa," the divide between the Salt and Little Colorado Rivers.

Further compounding the flagrant error in failing to comprehend that the south edge of the Black Mesa is the watershed divide, the Trustee's Opinion declares: "The surveyor was under no obligation to follow the divide as such. He was instructed to follow the south edge of the Black Mesa."[55] Again let it be stressed, the south edge of the Black Mesa *is* in fact the watershed divide and for the United States Trustee to adhere to the grossly erroneous June 12, 1967 Trustee's Opinion to deprive the Tribe of 16,090 acres of invaluable land partakes of a reprehensible distortion of both the facts and the law.

Where, as here, the Trustee designated the watershed divide as Tribe's northern boundary and thereafter departed from that boundary by an erroneous survey, the Court has repeatedly declared that: "The general rule is that in matters of boundaries calls for natural objects and fixed monuments control those for distances."[56] That concept was reiterated in the case of *Oklahoma v. Texas.*[57] Moreover, it is a governing principle of interpretation that: ". . . treaties with the Indians must be interpreted, as they

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[54] Appendix 9, p. 85a; *see* Appendix 3, p. 12a-13a.

[55] Appendix 9, p. 85a.

[56] *United States v. State Investment Co.*, 264 U.S. 206, 211 (1924).

[57] 268 U.S. 252, 256 (1925).

would have understood them . . . and any doubtful expressions in them should be resolved in the Indians' favor."[58] In a principal precedent respecting boundary disputes, the Court, in the case of *Northern Pacific Railroad Co. v. United States,*[59] intensively reviewed a boundary dispute involving the Yakima Indian Nation and in summary declared that:

> The main ridge necessarily had a definite and conspicuous individuality and needed no identification .... The Indians always claimed it as the western boundary of the Reservation and the earliest maps confirmed the claim."[60]

Thereafter, the Court enunciated the principle, which it is urged is controlling here:

> It was and is a natural and conspicuous landmark and was selected [as here] to define the immense area of land ceded by the Indians to the United States and the lesser though extensive tract reserved by them for their own use.[61]

From the opinion of the Ninth Circuit, that was affirmed by the Court, this most pertinent principle is enunciated which is controlling here:

> The United States owed the duty of trustee and guardian to preserve the rights of the Indians in the tract reserved, [as here] and by the treaty it agreed to survey the boundaries of the reservation, and set it apart for the exclusive use and benefit of the Indians. It [the United States] could

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[58] *Choctaw Nation v. Oklahoma,* 397 U.S. 620, 631 (1970) *Puyalup Indian Tribe v. Port of Tacoma,* 717 F.2d 1251, 1257, N.6 (1983) *cert. den.* 465 U.S. 1058 (1984).

[59] 227 U.S. 325, 355 (1913).

[60] *Ibid.,* p. 360.

[61] *Ibid.,* p. 360-361.

> not therefore by an incorrect survey deprive the Indians of their right of occupation of the land within the legal boundaries of the reservation as established by the treaty [here the Executive Orders of 1871 and 1872].[62]

This caveat by the Court respecting the obligations of the United States Trustee to the Tribe is worth repeating here and is most applicable:

> If the government may control the cession and control the survey and by the actions of its agents [as here] *foreclose inquiry or determine it*, an easy means of rapacity is afforded, much quieter but as effectual as fraud.[63]

More recently the Ninth Circuit reviewed in depth the issues presented here and established a fully documented precedent utilizing these terms: ". . . there is a presumption against changing boundary lines to Indian Reservations," adding, moreover, that: "If there is a general rule, then it is that an incorrect survey may not be relied upon to reduce the legal boundaries of an Indian reservation."[64] Adopting the principles from the *Northern Pacific* Decisions, the Ninth Circuit declared:

> The United States 'could not . . . by an incorrect survey deprive the Indians of their right of occupation of the land within the legal boundaries of the reservation . . . .'[65]

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[62] *Northern Pacific Ry. Co. v. United States*, 191 F.2d 947, 958 (1911).

[63] *Northern Pacific R.R. Co. v. United States*, 227 U.S. 355, 366 (1913). (Empashis supplied)

[64] *Sekaquaptewa v. MacDonald*, 626 F.2d 113, 118 (CA 9, 1980).

[65] *Ibid. See also United States v. Romaine*, 255 F. 253, 260 (CA 9, 1919); *United States v. Stotts*, 49 S.2d 619, 620 (U.S.D.C.W.D. Wash. 1930); *See* Vol. 6, *Commentaries on the Modern Law of Real Property*, p. 571, in which it is declared, Sec. 3044, "Superiority of Calls to

Predicated upon the principles enunciated and applied by the Court, the erroneous Wallace survey of 1887 could not divest the Tribe of its title to the 16,090 acres. Moreover, the patently erroneous June 12, 1967 Opinion of the Trustee could not and did not deprive the Tribe of its vested title to the lands in question.

II. Refusal of the Courts Below to Award Damages Having Declared Trustee Liable for Accelerated Erosion

The Court of Federal Claims declared that a fiduciary relationship existed between the United States Trustee and Petitioner Tribe due to the fact that the Trustee had initiated a program pursuant to which non-Indian owners were permitted to enter upon Tribe's reservation and to graze their livestock.[66] It was stressed by the Court of Federal Claims that, although the Trustee had no obligation to act in regard to its grazing program, having undertaken to administer the Tribe's reservation in that manner, it incurred the liability for any damages sustained. It was declared by the Court of Federal Claims that the Trustee's ". . . accedence to overstocking was less a matter of deliberate and reasoned policy as it was a consequence of careless administration."[67]

The Tribe has strenuously disagreed that the consequences should be attributed to "careless administration". It is manifest beyond question that the United States Trustee—whether by careless administration or intentional misconduct for its own benefit—has clearly violated its

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Monuments. . . . A 'monument' is a tangible landmark, and monuments as a general rule, prevail over courses and distances for the purpose of determining the location of a boundary. . . ." *See* Tiffany, Law of Real Property, 3rd Ed., p. 430, 514; Vol. 6, Thompson Real Property, p. 576.

[66] Appendix 4, p. 26a-27a.

[67] *Ibid*, p. 31.

fiduciary obligation and is responsible for all of the damages the Tribe has experienced.[68] There the Court of Federal Claims states, with an abundance of authorities in support, that where, as here, the United States Trustee ". . . takes on or has control or supervision over tribal . . . properties, the fiduciary relationship normally exists with respect to such . . . properties . . .", citing *Seminole Nation v. United States*.[69] In *Cramer v. United States*, the Court voided a federal land patent which had granted Indian-occupied lands to a railway.[70] As reviewed above, the consequences of the "careless administration" included the finding by the Court of Federal Claims that the United States Trustee "had initiated and condoned" the overgrazing of Tribe's reservation and ". . . must be held liable for the accelerated erosion that resulted."[71]

It is important here to consider the principles enunciated by the Court respecting the Trustee's obligation to preserve and to protect Tribe's reservation—subject *res* in these proceedings. Those obligations were summarized by the Court in *Shoshone Tribe v. United States*:

> Power to control and manage the property and affairs of Indians in good faith for their betterment and welfare may be exerted in many ways. . . .[72]

The Court then added the critical principles that the power thus vested in the Trustee does not authorize or enable the United States:

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[68] *Ibid.*, p. 26a; *The Navajo Tribe of Indians v. United States*, 624 F.2d 981, 987 (Cl.Ct. 1980)

[69] 316 U.S. 286, 296-300 (1942).

[70] 261 U.S. 219 (1923).

[71] Appendix 4, p. 46a.

[72] 299 U.S. 476, 497 (1937).

> '. . . to give the tribal lands to others, or to appropriate them to its own purposes, without rendering, or assuming an obligation to render, just compensation for them,' [citing *United States v. Creek Nation.*][73]

The Court emphasized that for the Trustee to use Tribe's property for itself or for others, as here, " '. . . would not be an exercise of guardianship, but an act of confiscation. . . .' "[74] The rights of Indian Tribes ". . . to the occupancy of the lands . . . is 'as sacred as that of the United States to the fee,' " concluding that "Spoliation [as here] is not management."[75]

It is respectfully urged to the Court that there is positive proof of "spoliation" in the photos lodged with the Court which establish beyond controversy the environmental disaster stemming from the accelerated erosion for which the Trustee has been held liable.

There is reiterated and reapplied the concepts of *Shoshone* in the hallmark case of *Seminole Nation v. United States.*[76] The Court declared that the Trustee is obligated to fulfill its fiduciary responsibilities owning to Petitioner Tribe ". . . by the most exacting fiduciary standards." Irrespective of that governing principle of law, the Court of Federal Claims absolved the Trustee from any damages for the disaster so graphically displayed to the Court. It is worth reemphasizing that the Trustee was not required to pay any damages for the accelerated erosion pre-1946 nor for the ongoing accelerated erosion which continues to date. It is stressed in *Seminole Nation* that the Trustee is obligated to perform its responsibility with uncompro-

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[73] 295 U.S. 103, 110, (1935).

[74] *Ibid.*; *see* also *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113 (1919).

[75] *Shoshone Tribe v. United States*, 299 U.S. 476, 498 (1937).

[76] 316 U.S. 285, 297, *et seq.* (1942).

mising rigidity and there must be applied the rule of undivided loyalty between the United States Trustee and Petitioner Tribe.[77]

Rather than applying those concepts of *Shoshone* and *Seminole*, the Court of Federal Claims sought ways and means to rationalize a reduction in the Trustee's obligations, not only for the disastrous consequences to Tribe's reservation antecedent to 1946 but thereafter to the present as well. For example, the Court of Federal Claims, with unchallenged proof before it that the damages continued subsequent to 1946 to the present, declared that it would "... analyze damages only for liability predicated upon Government activities occurring before August 13, 1946."[78] Under the heading of "Continuing Wrong," the Court of Federal Claims declared that Petitioner Tribe had alleged "... that erosion has continued from before 1946 into the present.[79] The unchallenged proof, as established by Petitioner Tribe, is that the damage from the erosion is even greater today than it was in 1946.[80] In seeking to overcome Tribe's challenges to the analysis of the Court of Federal Claims, it referred to the fact that Petitioner Tribe's expert, Mr. Kaczmarek, stated that:

> ... based on his examination of aerial photographs taken in 1935 and in the 1980's, by 1935 the magnitude of erosion on the reservation essentially was the same as it is today.[81]

However, the Court of Federal Claims, in total error, failed to consider the unchallenged and unrefuted proof "... that accelerated erosion has continued on the Fort

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[77] *Idid.*

[78] Appendix 4, p. 54a.

[79] *Ibid.* p. 52a.

[80] *Supra*, p. 16, *et seq.*

[81] Appendix 4, p. 52a.

Apache Indian Reservation from at least as early as 1912 to the present and is continuing to damage reservation land, water, and range resources at an unabated rate."[82]

Moreover, the Court of Federal Claims, by its findings, contradicts its own conclusions that the erosion and the disastrous consequences of it were ended 60 years ago. That Court found as a fact that the ongoing destruction of vegetative cover leaves bare spots on the surface of the soil increasing the aridity of the soil and decreasing the penetration of rain water into the soil.[83] The result of that increased aridity and the attendant depletion of soil moisture is the destruction of the natural vegetation and the replacement of it by the rampant expansion of noxious growths rendering the land useless for any purposes. Those facts are graphically displayed in the photographs deposited with the Court.[84] Another phase of the accelerated erosion—again to use the terminology of the Court of Federal Claims—is the washing away of top soil leaving the once highly productive land a barren, useless waste, also displayed in the photographs deposited with the Clerk of the Court.[85]

III. Denial of Petitioner Tribe's Right to Judicial Due Process

When Petitioner Tribe prosecuted its final appeal in Docket 22-H, it fully documented its charges that the Court of Federal Claims had not and would not grant the Tribe a hearing respecting its claims to the 16,090 acres within Tribe's reservation which are illegally occupied by the

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[82] Appendix 12, p. 99a.

[83] Appendix 4, p. 35a.

[84] Appendix 4, p. 34a; also *see* photos deposited with Clerk.

[85] Appendix 4, p. 34a.

United States Trustee.[86] There was thus presented to the Federal Circuit the specific request for an order mandating the Court of Federal Claims to hear Petitioner Tribe. The Trustee United States vigorously rejected[87] Tribe's request to be heard by the Court of Federal Claims, asserting to the Federal Circuit that the Tribe could not challenge the 1972 Compromise Settlement, alleging that the Settlement and other decisions were *res judicata* against the Tribe.[88]

There is no merit to the Trustee's assertions that the Tribe's claim to the 16,090 acres is barred by *res judicata* by reason of the action taken by the Indian Claims Commission[89] and the Compromise Settlement entered into between the Trustee and the Tribe.[90] Most assuredly both of those decisions by the Indian Claims Commission fully support Tribe's claims to the 16,090 acres which are within Tribe's reservation and were not part of the lands "outside" Tribe's reservation that were taken.[91]

The Trustee likewise cites, in support of its contentions that the Tribe is barred by *res judicata*, the cases of *White Mountain Apache Tribe v. Clark*[92] and *White Mountain Apache Tribe v. Hodel*.[93] The Trustee is fully aware that the United States was not a party to either the *Clark* or

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[86] *Choate v. Trapp*, 224 U.S. 665, 677-678 (1912); *Jones v. Meehan*, 175 U.S. 1, (1899) *see*, also *United States v. Southern Ute Tribe*, 402 U.S. 159 (1971); *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970).

[87] Appendix 17, p. 114a.

[88] Appendix 10, *San Carlos v. United States*, 28 Ind.Cl.Comm. 399 (1972).

[89] Appendix 6, p. 75a, *San Carlos v. United States*, 21 Ind.Cl.Comm. 189 (1969).

[90] Appendix 10, p. 87a-88a, *San Carlos v. United States*, 28 Ind.Cl.Comm. 399 (1972).

[91] *Supra.*, p. 11, *et seq.*

[92] 604 F.Supp. 185, 187-189 (U.S.D.C.Ariz. 1984).

[93] 784 F.2d 921 (CA 9, 1986) *cert. den.* 479 U.S. 1006 (1986).

Hodel cases and likewise is aware that there is no predicate for asserting the defense of *res judicata* under those circumstances. Indeed there is specific precedence which declares that where the United States is not a party to the proceeding, the defense of *res judicata* has no application.[94]

It is an anomaly for the United States Trustee to assert that the Tribe was challenging the Compromise Settlement. To the contrary, Petitioner Tribe was asserting to the Court of Federal Claims that it desired to have the explicit language of the 1972 Compromise Settlement applied and effectuated for the reason that it clearly establishes that the lands located "*outside*" of the boundaries ". . . of the Reservation established by the Executive Orders of November 9, 1871 and December 14, 1872,"[95] had been taken, leaving title to the lands within the reservation, including the 16,090 acres, in Petitioner White Mountain Apache Tribe. Having been denied its right to be heard respecting its valid claims to title by the United States Court of Appeals for the Federal Circuit, Petitioner Tribe prays the Court that it grant this petition for certiorari to assure Petitioner Tribe its Constitutional right to due process.

CONCLUSION

There has been chronicled and documented above the shocking disregard by the United States Court of Appeals of Petitioner Tribe's Constitutional right to due process respecting its valid claims to the 16,090 acres located within Tribe's reservation which are illegally occupied by the United States Trustee. In denying Tribe's right to a fully and fair hearing respecting its valid claims to title,

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[94] *Land v. Dollar*, 330 U.S. 731, 736 (1947), citing *United States v. Lee*, 106 U.S. 196 (1882).

[95] Appendix 6, p. 75a; Appendix 10, p. 87a-88a.

the Federal Circuit adopted without question the gravely erroneous statements by the United States Trustee that Tribe's valid claims to title had been resolved or subsumed in other proceedings. As reviewed above, there is no merit in that grossly erroneous conclusion.[96]

Equally shocking is the affirmance by the United States Court of Appeals for the Federal Circuit of the decision of the Court of Federal Claims which denied Petitioner Tribe damages for accelerated erosion up to August, 1946 and for the accelerated erosion that is ongoing today.[97]

Petitioner Tribe's right to Constitutional Due Process so gravely violated by the courts below has been variously defined by the court as being "... based on moral principles ... fundamental to a civilized society. ... Due Process is that which comports with the deepest notions of what is fair and right and just."[98] The Court has likewise declared that due process is violated if a practice or rule "... offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."[99] On that background, Petitioner Tribe prays the Court to grant this petition.

Respectfully submitted,

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[96] *Supra*, p. 11, 13, 20, *et seq.*

[97] *Supra.*, p. 23, *et seq.*

[98] *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950).

[99] *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).